

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 18Apr2001

CASE NO.: 2000-LHC-1293

OWCP NO.: 2-116652

IN THE MATTER OF

LARRY L. PASCARETTI

Claimant

VS.

GENERAL DYNAMICS LAND SYSTEMS

Employer

TRAVELERS INSURANCE COMPANY

Carrier

APPEARANCES:

Gary B. Pitts, Esq.

For Claimant

Robert E. Thomas, Esq.

For Employer

BEFORE: C. RICHARD AVERY

Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), as extended by the Defense

Base Act, 42 U.S.C. §1651. This claim is brought by Larry Pascaretti (Claimant) against General Dynamics Land Systems (Employer) and Travelers Insurance Company (Carrier). The formal hearing was conducted at Houston, Texas on October 23, 2000. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.¹ The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-79 and Employer's Exhibits 1-20.² This decision is based on the entire record.³

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The fact of injury is disputed. It is undisputed that Claimant was assigned to work in Saudi Arabia between November 6, 1990 and January 20, 1991 and that this claim properly falls under the Defense Base Act;

2. The fact of injury/accident is disputed;

3. Claimant alleges toxic exposure during the Gulf War and his duty in Saudi Arabia, between November 6, 1990 and January 20, 1991, caused or contributed to his disability. This is disputed by Employer/Carrier.

4. An employer/employee relationship existed between August 6, 1982 and February 15, 1991, but injury on-the-job is disputed;

5. It is disputed that the alleged injury arose in the course and within the scope of employment;

¹The parties were granted time post hearing to file briefs. This time was extended up to and through January 10, 2001.

²Claimant's Exhibits 3-4 and Employer's Exhibits 19-20 were submitted post hearing.

³ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __, lines __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

6. Employer was notified of the alleged injury on May 22, 1996;

7. Notification of the alleged injury/death pursuant to Section 12 of the Act to Employer was May 22, 1996 and the Secretary of Labor was May 30, 1995 (filed LS-207);

8. An informal conference was held on October 10, 1996;

9. Notice of Controversion was filed on October 30, 1996⁴;

10. It is disputed that a disability resulted from the alleged injury;

11. No medical benefits under Section 7 of the Act have been paid;

12. No compensation has been paid;

13. Claimant alleges an average weekly wage of \$1,054.37. This is disputed by Employer/Carrier;

14. Date of maximum medical improvement is disputed; and

15. Claimant earned the following amounts after the Gulf War: balance of 1991- \$22,525; 1992- \$3,886; 1993- \$2,605; 1994- \$6,981; 1995- \$29,562; 1996- \$32,296; 1997- \$46,819; 1998- \$54,750; 1999- \$53,542; and to present in 2000 is about the same level as 1999.

Unresolved Issues

The unresolved issues in this case are:

1. Timely notice of filing;

2. Fact of injury in the course and scope of employment in Saudi Arabia;

3. Nature and extent of disability; and loss of wage earning capacity;

⁴See Employer's Exhibit 11.

4. Average weekly wage; and
5. Attorney's fees and expenses.

Statement of the Evidence
Testimonial and Non Medical Evidence

Claimant was 51 at the time of the trial.⁵ He is married and has two children. Claimant grew up in Detroit, Michigan. After graduating from high school, Claimant attended electronics school for one year. For the next four years, Claimant served in the Air Force as an electronic warfare repairman.⁶ After the Air Force, Claimant studied pre-engineering for one year at Macomb City Community College. Claimant then ran his own business of snow removal for a few years, but did not earn much profit. Claimant was subsequently an English instructor in Bangkok, Thailand for the following six years.

In 1982, Claimant returned from Thailand and went to work for General Dynamics.⁷ Claimant worked as an electrical assembler and an electrical inspector for five years. Claimant subsequently worked in Germany for two years as a driver/mechanic of the M1A1 tank. In November 1990, Claimant was sent to Saudi Arabia as an inspector of the M1A1 tank. He was responsible for ensuring that all components in the tank functioned properly. Claimant inspected these tanks as they were discharged into Saudi Arabian ports prior to delivery to the military. After all of the tanks arrived, Claimant was never assigned to units on the border area. Upon returning to the States on January 20, 1991, Claimant's job with Employer was terminated due to a reduction in force.⁸

⁵Employer's Exhibit 8 is Claimant's deposition.

⁶Claimant's Exhibit 79 is the certificate of release of discharge from Active Duty, DD-214.

⁷Claimant was employed by Employer from 1982 until 1991.

⁸See Claimant's Exhibit 2, a certificate of achievement, dated March 4, 1991, from the US Army to Claimant regarding his work during the Gulf War. See also Claimant's Exhibit 6, a letter of appreciation from Employer's Vice President thanking Claimant for his work on the M1A1 tank while in the Gulf. Claimant's Exhibit 48 is a letter of recognition and appreciation, dated February 8, 1991, from Employer to Claimant stating that Claimant did well in the "short term, difficult assignment to

While Claimant was in the Gulf, he continually heard the sound of chemical agent alarms. Claimant was told that the alarms were false and to disregard them. Claimant was also in the vicinity of SCUD missile explosions. His stress level was greatly increased with the chemical alarms and missile strikes. During the bombing of the Iraqi chemical storage and production facilities, Claimant was located in north eastern Saudi Arabia, in Park Dahman.

Claimant was issued one Mission Oriented Protective Posture (MOPP) suit and one gas mask, without extra filters. Claimant was also given pyredostigmine bromine (PB) anti-nerve gas pills, which he dutifully consumed. In addition, he was given various vaccinations, including an anti-anthrax shot.

Claimant's health when he left Germany and was assigned to Saudi Arabia was good. Prior to the Gulf War, Claimant did not suffer from any of the following: joint pain, chronic fatigue, diarrhea, short-term memory loss, poor concentration, difficulty understanding daily activities, tasks, anxiety, muscle pains, sleep problems, moodiness, irritability, or chemical sensitivities. Claimant has, however, experienced such problems since returning from the Gulf War.

In 1998, Claimant was a participant of a government funded study on Gulf War Illness, conducted by Dr. Hyman. He was hospitalized for two to three weeks during the study, at which time he was given antibiotics to treat his symptoms. Since that treatment, Claimant's symptoms have improved.

Claimant currently suffers from a multitude of symptoms, which developed approximately in 1992. He experiences joint pain, which has improved with the treatment provided by Dr. Hyman. Claimant has bouts of fatigue, the onset of which occurred while Claimant was still in the Gulf. Claimant also suffers from chronic diarrhea, short-term memory loss, anxiety, moodiness, irritability, and depression. He likewise has problems sleeping and is more sensitive to chemicals. Since the Gulf war, Claimant has also suffered from skin cancer, skin rashes, and muscle pain.

Southwest Asia. Many times these assignments were stressful for you." Claimant's Exhibit 49 is a letter of appreciation, dated February 28, 1991, from the Field Operations manager to Claimant and Claimant's Exhibit 50 is a letter of commendation, dated March 13, 1991, from Employer's manager.

Upon returning to the States, Claimant started his own vending machine business. Because of continuous joint pain and extreme fatigue, Claimant was unable to maintain his business, so he turned it over to his wife and son. Claimant is currently employed by the Michigan Bell Telephone Company and has been since 1994. He works as an electronic technician, maintaining electronic equipment inside the central office, 40 hours a day, 5 days a week. Claimant works the night shift where his activities and responsibilities are less physically and mentally demanding. He is paid an hourly rate of \$22.

Claimant filed his claim on May 30, 1995 because he believed that his symptoms might be related toxic exposure during the Gulf War.⁹ Prior to 1995, Claimant suspected that his symptoms might have been related to his overseas employment, but no doctor corroborated his suspicions.

Claimant's Exhibit 1 is an inter-office memo of Employer dated November 14, 1991. It states that Employer was aware that its employees who worked in the Persian Gulf, specifically southwest Asia, were exposed to possible health hazards. During the Gulf War, Employer administered to its personnel a multitude of prophylactic treatments for chemical and biological threats, such as nerve agents, Anthrax, etc. Employees were also exposed to fumes from burning oil fields in Kuwait. The memo concluded that the long term affects of the toxic exposures have not as yet been determined and current evaluations were not conclusive.

Employer's Exhibit 15 is Claimant's personnel file while employed by Employer. Claimant's job title was mechanic and driver. His base pay was \$33,667 per year. His last day worked was September 27, 1991, due to an indefinite layoff because of no available work.¹⁰ Also included was a contract regarding Claimant's short-term foreign assignment in support of Operation Desert Shield.

⁹Claimant read an ad for Dr. Hyman's study and realized he suffers from the symptoms listed in the ad. *See* Claimant's Exhibit 38, LS-203.

¹⁰Claimant testified that he was laid off in February 1991, but did subsequent small jobs for Employer.

Employer's Exhibit 13 is Claimant's answers to interrogatories. Claimant stated he was exposed to low-level chemical warfare agents. Claimant was downwind of Iraqi chemical warfare storage and production facilities that were bombed. In addition, he heard chemical alarms and was in the vicinity of SCUD missile attacks. Claimant likewise was exposed to PB pills and multiple vaccinations. Claimant's Exhibit 78 is Employer's answers to interrogatories.

Employer's Exhibit 12 and Claimant's Exhibit 36 is Claimant's Social Security records from January 1967 through December 1995. Claimant's Exhibit 52 is Claimant's tax returns of 1997, 1998, and 1999. Employer's Exhibit 14 is a report from the Council on Office Laboratory Accreditation and Department of Health and Human Services, Food and Drug Administration regarding inspections and deficiencies noted of the Environmental Health Center in Dallas, in connection with the claim of Donald L. Frans v. General Dynamics Corporation, ALJ No. 2000-LHC-593.

In addition to the foregoing, Claimant's Exhibits 7-35, 37, 39-47, 53-61, 63-77 and Employer's Exhibits 1-7, 9-10 are various articles and studies relating to the Gulf War. Also included is Claimant's Exhibit 51, a videotape documenting Gulf War illness. All of these exhibits have been read and/or viewed. When applicable, the information from these exhibits will be cited in the opinion.

Medical Evidence

Claimant's Exhibit 5 is Claimant's medical records from 1995 through 2000. In February 1995, Claimant had various tests performed at the Meadowbrook Family MedCenter. Claimant was assessed with polyarthritis, fatigue, collagen vascular disease and hemorrhoids, of which Claimant has had a problem for the past 15 years. Dr. Steven Klein, a colon and rectal surgeon, examined Claimant on July 18, 1995 and concluded that Claimant's hemorrhoids were an "element of irritable bowel syndrome." (CX 5, page 13)

Dr. Louis White examined Claimant on August 6, 1996 and noted that Claimant complained of achy joints and chronic fatigue since returning from overseas.¹¹ Dr. White wrote a letter to the Department of Labor, dated October 3,

¹¹No evidence was offered as to Dr. White's qualifications.

1996, stating Claimant “has medical problems which in my opinion have a reasonable medical probability of being caused or aggravated by something he was exposed to overseas during Desert Storm. Symptoms include chronic fatigue, achy joints, and chronic diarrhea.”¹² (CX 5, page 25)

In April 1998, Claimant completed a Desert Storm Syndrome Study Pre-Screening Questionnaire for Dr. Edward Hyman.¹³ Claimant listed the following symptoms with the onset date: fatigue, January 1992; difficulty in understanding daily activities/tasks, January 1994; short-term memory loss, January 1994; joint/muscle pain, January 1992; skin rashes/itching, April 1997; diarrhea, January 1992; and sleep disorder, January 1992. On a daily basis, Claimant experienced tiredness, loss of stamina, weakness, loss of concentration, and mental confusion. Claimant often experienced lower back, hip, knee and ankle discomfort.

Claimant rated his overall health as “fair.” Claimant’s declining health limited his participation in vigorous and moderate activities over the past 3 months, as well as his ability to walk/climb uphill, bend, lift and stoop. Claimant was not, however, limited in his ability to walk one block, eat, dress, bath or use the toilet.

On May 6, 1998, Claimant signed the consent form for the Desert Storm Syndrome Study, performed by Dr. Hyman.¹⁴ Claimant was initially evaluated at Stony Brook in June 1998. He was admitted to Touro Infirmary for in-patient hospitalization on July 28, 1998 and subsequently discharged on August 17, 1998.¹⁵ During the hospitalization, Claimant was administered large doses of antibiotics

¹²See Employer’s Exhibit 16.

¹³In a cover letter prefacing the patient consent form, it stated that Dr. Hyman had successfully treated 10 Gulf War Veterans for Desert Storm Syndrome.

¹⁴ The study took place in New Orleans, LA at the Touro Infirmary (in-patient hospitalization) and New York at the Stony Brook State University-New York University Hospital (studies/evaluations). The procedure occurred as follows: physical/lab exam in LA, evaluation by independent doctors in NY, 2/3 weeks of intravenous/placebo treatment in LA, oral medication for 14 weeks where Claimant normally resided, follow up visits in LA and an independent evaluation in NY.

¹⁵See Employer’s Exhibits 17 and 18.

and he completed a patient symptom diary rating his symptoms in response to the treatment.

Upon discharge, Dr. Hyman remarked that Claimant had a rash of red papules, which was a characteristic of all his other patients. Dr. Hyman diagnosed Claimant with “desert storm syndrome, indolent bacteriemia due to enterococcus, indolent bacteriuria, and multiple symptoms such as chronic fatigue, cognitive loss, memory loss, arthralgia, fever and skin rash.” (CX 5, page 169)

Claimant had follow-up visits with Dr. Hyman from August 24, 1998 through January 12, 1999, at which time the study concluded. Claimant was evaluated in Stony Brook beginning in January 1999. The investigator there believed that Claimant was issued a placebo, rather than active treatment, because Claimant’s condition had “improved, but not markedly so.” (CX 5, page 184) Claimant was, however, administered active treatment and he stated he was feeling better at the end of the study.

Dr. Hyman, on April 7 and June 5, 2000, completed a questionnaire regarding Claimant. Dr. Hyman diagnosed Claimant with Gulf War Syndrome and stated that Claimant’s condition began while Claimant was in the Persian Gulf. He stated it was necessary for Claimant to work intermittently or to work less than a full schedule because of his condition for an indefinite period. Likewise, an indefinite number of additional treatments, in the form of large doses of i.v. antibiotics, were required. Dr. Hyman stated that Claimant had a cognitive loss which could impair his ability to perform essential functions of his job.

Dr. Deming, in response to a letter dated September 8, 2000, from Claimant’s counsel asking for Claimant’s medical records from Stony Brook regarding neurological testing, commented that “of the first 18 treated patients in the study, 13 improved dramatically. There were 5 who did least well,” one of which was Claimant. (CX 5, page 200) Claimant was initially evaluated at Stony Brook on June 9, 1998 because he met the inclusion criteria for the study. His primary symptoms included joint pain, fatigue and impaired cognitive function. Claimant was re-evaluated four months later. His symptoms of fatigue and pain decreased. Claimant’s quality of life rating also increased. Claimant described the improvements as 30%.

Claimant's Exhibit 62 is medical records from Dr. Yee and the Sterling Heights Clinic.¹⁶ Claimant has been examined by many doctors at this Clinic from October 30, 1986 through June 5, 2000. In October 1986, Claimant complained of fatigue and joint pain in his hand. Claimant, during this time period, also injured his thumb and was evaluated for HIV upon his return from Thailand.

Dr. Yee first examined Claimant on April 23, 1999. Claimant complained of a skin lesion on his upper neck. Dr. Yee's impression was a skin lesion "suspicious for a basal cell carcinoma." (CX 62, page 18) Dr. Yee referred Claimant to the Dermatology department, where a biopsy of the lesion was performed and the lesion was subsequently removed on June 29, 1999. Dr. Yee examined Claimant on October 15, 1999 because Claimant requested an RNA test. Dr. Yee's impression, after talking with Claimant, was a history of Gulf War Syndrome. His plan was to obtain Claimant's plasma RNA and speak to Dr. Hyman about the Desert Storm Study. Dr. Yee lastly examined Claimant on June 5, 2000. His impression was "1. History of Gulf War Syndrome; 2. History of arthralgias, particularly involving both lower extremities, most likely related to #1 above; 3. Previous history of basal cell carcinoma." (CX 62, page 26)

Claimant's Exhibit 3 is the deposition of Dr. William J. Rea, taken on October 6, 2000. Dr. Rea is board certified in cardiovascular surgery, general surgery and environmental medicine.¹⁷ Dr. Rea has done research in the field of cardiovascular disease and chemical exposure. He has also written 140 peer-reviewed research papers, four text books on chemical sensitivity and chapters for numerous other text books in immunology. Dr. Rea has treated about 80 Gulf War veterans for toxic exposure and published a medical journal article regarding Gulf War illness. He also testified before the United States Congress in their investigation of Gulf War illness. Dr. Rea agreed to base his opinions, during the deposition, on reasonable medical probability.

Dr. Rea examined Claimant on September 18, 2000. Claimant explained he worked for Employer as a tank inspector in Saudi Arabia during the Gulf War. His

¹⁶No evidence was offered as to Dr. Yee's qualifications.

¹⁷Environmental medicine includes the study or effects of anything in the environment upon an individual including environmental pollutants, foods, molds, pollens, any physical phenomenon, etc.

symptoms, while there, included aching joints, diarrhea, and fatigue. Claimant's exposure to toxins included immunization vaccinations, Bromide pills, as well as being present in the vicinity of two/three SCUD missile explosions. Claimant also inhaled diesel fumes 12 hours per day, each day.¹⁸

It was Dr. Rea's understanding that prior to the Gulf War Claimant worked without limitation and was in good health. Dr. Rea admitted that he had not reviewed records from a pre-employment physical examination. It was his belief that Claimant had not previously undergone any of the diagnostic tests that he performed during this examination. Dr. Rea administered a variety of tests on Claimant including a posturography test, neuropsychological evaluation, thermography, autonomic nervous system test of the eye and heart, heart rate variability, blood test, immune test, and microplasm test.¹⁹

As regards the posturography, or balance test, Claimant did not pass as to either sensory or motor coordination. The neuropsychological evaluation had abnormal results. The results of the thermography was also abnormal, as was the finding of the heart rate variability. However, the autonomic nervous system test through the eye and heart had a finding of normal. Claimant's white blood count was normal, but his immune tests had findings of abnormal. The microplasma finding was normal.²⁰

All of the tests administered to Claimant were objective tests. The findings of abnormal were compatible with toxic exposure. Dr. Rea opined that Claimant's symptoms were a result of exposure during the Gulf War. Claimant's symptoms and condition were compatible with other ill Gulf War veterans. Claimant's

¹⁸Claimant had been treated by Dr. Hyman in 1997 and his symptoms had somewhat improved. Claimant ended his antibiotic treatment three weeks before Dr. Rea's examination. As a result, Claimant's diarrhea began again, and he developed a skin rash, short-term memory loss, burning eyes, bloating, muscle and joint pains, mood swings, as well as a sensitivity to chemicals, such as car exhaust, perfume, pesticides, aerosols and disinfectants.

¹⁹Dr. Martinez performed the posturography and Dr. Didriksen performed the neuropsychological evaluation.

²⁰Dr. Rea gave credited Dr. Hyman's antibiotic treatment for this finding, because antibiotics kill microplasma.

problems are of a permanent nature. Dr. Rea treated Claimant with two bacteria injections and believed further treatment would improve Claimant's condition.

In Dr. Rea's opinion, Claimant's present condition impairs his work ability. He recognized that Claimant has worked since returning from the Gulf and is presently working full time. However, Dr. Rea determined that Claimant's present work ability was not the same as in the past. Claimant complained of lack of stamina and problems thinking. Claimant's job at the telephone company "doesn't take a lot of thinking," while his job as a tank inspector was very meticulous.

Dr. Rea was asked questions concerning Dr. Hyman's findings.²¹ According to Dr. Hyman's records, he was of the opinion that Claimant had contracted an infection due to bacteria. This bacteria originated from Claimant's environment. Dr. Rea agreed that it would be impossible to specify the exact environment that contained the harmful bacteria. However, Dr. Rea stated that a person exposed to a multitude of toxic chemicals would have a lower resistance to bacterial infection. This lower resistance was common in Desert Storm patients examined by Dr. Rea.

Dr. Rea performed a challenge test on Claimant and found that Claimant was sensitive to formaldehyde and orsa. Dr. Rea did not, however, perform a scratch test, patch test, RAST test, or booth test because these tests were inappropriate for situations like Claimant's. Claimant was not administered the Desert Storm vaccine because not enough time had elapsed after finishing Dr. Hyman's antibiotic treatment. Dr. Rea believed Claimant would benefit from this vaccine because he had such a good response from Dr. Hyman's treatments.

Claimant's Exhibit 4 is the medical report of Dr. Nancy Didriksen. Dr. Didriksen is a board certified psychologist. She examined Claimant on September 21, 2000. She was asked by Claimant's counsel to assess the degree of Claimant's neurocognitive and personality/behavioral dysfunction, subsequent to toxic exposure in Saudi Arabia during the Gulf War. Dr. Didriksen administered a variety of tests to Claimant, performed a clinical interview and mental status examination and reviewed the medical records of Dr. Louis White, Touro Infirmary, Stony

²¹Dr. Rea qualified all of his answers by stating he would like to confer with Dr. Hyman.

Brook State University of New York, Dr. Hyman and Dr. Deming. Claimant was cooperative during the evaluation.

Claimant reported the following physical symptoms: diarrhea, joint pain, fatigue, bloating, grogginess, gas, low energy, excessive perspiration, difficulty remaining asleep, clumsiness, accident proneness, weight gain, weakness, restlessness, skin problems (basal cell carcinoma), eye problems, and balance/coordination problems.

Claimant reported the following psychological symptoms: exquisite sensitivity, inability to cope well with daily stressors, overwhelming exhaustion, fatigue, or weariness, present performance inferior to prior performance or level of functioning, tense, difficulty bouncing back from adversity, irritability, negation of joy, pervading pessimism, feeling that life is not worth living and wishing to die, feeling that problems and tasks are insurmountable, unexplained anger, difficulty getting started in the morning, withdrawal from loved ones, feelings of being unloved or unlovable, feelings of being misunderstood by others, feelings that “I’m not myself,” or “What is happening to me?”, free-floating anxiety, mood swings seemingly associated with changes in the weather, feelings of needing to punish or get back at others, overreacting to situations, “cloudy, foggy, spacey,” diminished self-confidence and self-esteem, difficulty setting and reaching goals, sense of hopelessness, and worries about bodily dysfunction.

Claimant reported the following neurocognitive symptoms: decreased attention, concentration, immediate and short-term memory problems, receptive speech difficulties, lost trains of thought, poorly organized, decreased long-term memory and comprehension, naming and word-finding problems, slowed thinking, slurred speech, reversing numbers and/or letters, difficulty with problem solving, does not remember doing things, and difficulty articulating a point when speaking or writing.

Claimant also reported difficulty learning new material and performing his job because of his physical and mental limitations. Claimant stated he is easily distracted and withdraws from others during stressful times. Claimant discussed his experiences in the Persian Gulf. He believed he was exposed to depleted uranium, Scud missile fall out, organophosphates, pesticides and pyridostigmine bromide (PB). Claimant believed his illness stemmed from the PB exposure.

Dr. Didriksen opined that Claimant was exposed to a variety of toxins while working for Employer in the Persian Gulf during 1990 and 1991. She diagnosed Claimant with “toxic encephalopathy (mild, chronic, reversibility uncertain without treatment and avoidance of toxic/neurotoxic substances), psychological factors associated with (but secondary to) physical condition classified elsewhere.” (CX 4, page 12) She further concluded:

Claimant’s test results are generally consistent with others who have been evaluated in this office after neurotoxic exposure in the Persian Gulf, as well as reported in the literature. There do not appear to be any other factors, such as metabolic problems, drug or alcohol abuse, head injury, or other toxic exposures which would account for his current condition. It is my opinion that the observed current neurocognitive deficits and compromise in emotional equilibrium (secondary to illness and disability) have resulted from exposure in the Persian Gulf, while working as a tank inspector for General Dynamics Corporation during 1990 and 1991. There is no evidence of malingering. (CX 4, page 12)

Dr. Didriksen recommended the avoidance of toxic/neurotoxic substances to the best of Claimant’s ability, the extensive use of lists/schedules/reminders to compensate for memory loss, continued active learning (reading, computer skills, formal/informal classes) to improve executive functioning, as well as a formal neurocognitive rehabilitation program and supportive/adjustment therapy (stress management and relaxation training). Dr. Didriksen also recommended re-evaluation in 12 to 18 months after treatment to assess the effects of treatment and the avoidance of toxic/neurotoxic substances.

As regards Claimant’s ability to work, Dr. Didriksen stated “Claimant’s very impaired memory and poor executive functioning preclude effective workplace functioning in any setting.” (CX 4, page 13) She believed Claimant could resume gainful employment and function adequately without restrictions once he regained neurocognitive functioning and physical health.

Employer’s Exhibit 20 is the medical report of Dr. Kenneth Adams. Dr. Adams is board certified in clinical neuropsychology and clinical psychology. Dr.

Adams examined Claimant on September 27, 2000, at which time, at the request of Employer's counsel, he performed a neuropsychological assessment.

Dr. Adams obtained a social, employment and medical history from Claimant. Claimant discussed his overseas employment in the Persian Gulf. Claimant believed he was exposed to toxins because he was administered various vaccinations, heard the sound of chemical alarms, and was in the vicinity of pesticides. He was also instructed to wear the MOPP suit. Details more specific were not provided to Dr. Adams.

Claimant reported both physical and mental symptoms, the onset of which occurred after the Gulf War. Claimant's symptomatology included diminished sense of smell and taste, problems with short-term memory, thinking, concentration, and patience. He was socially withdrawn and had problems sleeping. Claimant rated his quality of sleep as "fairly bad." Claimant also experienced joint pain, muscle weakness, coordination problems, and problems with anger/temper. Likewise, Claimant had trouble walking, understanding others, remembering the "right" word, and following conversations.

Dr. Adams commented that Claimant did not consistently provide full effort during the tests. However, he understood this to be because Claimant had a prior neuropsychological examination by Dr. Didriksen earlier in the week. Dr. Adams stated that Claimant "gave a good effort and was cooperative with the examination." (EX 20, page 7)

After administering a variety of tests, Dr. Adams concluded that Claimant had no neuropsychological impairment. There was no evidence of neurological, neuroimaging, or neuropsychological correlation with Claimant's symptoms. Dr. Adams remarked that Claimant was inconsistent in the presentation of his history to various health care providers. "What does appear to me is a trend toward a refinement of the symptoms to match what is reported in various documents defining or explicating what Gulf War Illness might be." (EX 20, page 8)

Dr. Adams stated that "there appear to be multiple pathways or possibilities of hypothesis to link his employment work during his months in Saudi Arabia to the emergence of symptoms. However, none of the causal links are well-defined." (CX 20, page 8) Dr. Adams stated he was not given specific details regarding

Claimant's employment in the Gulf, as these details would have given him a more complete picture. Dr. Adams reviewed Dr. Didriksen's report and deduced that her diagnosis was neither scientifically nor clinically sound. He determined that Dr. Didriksen's reporting and interpretation was "rote in character." Dr. Adams opined:

There is no neuropsychological or psychological diagnosis that obtains here. This includes malingering or forms of impression management. The relationship between Claimant's subjective symptoms and his own personal psychology is probably complex. The prognosis for the continuance of Claimant's symptom reports is unclear and will not be resolvable by neuropsychological means. I do not see any prior injuries or pre-existing conditions in this case. Claimant presents with certain symptoms that are self-reported and bear some relation to those presentations described in the medical literature regarding Gulf War Illness. Efforts to understand the etiology or etiologies of these presentations have not been successful, but are obviously ongoing. There does not appear in this case to be objective findings confirming neurobehavioral disorder from any of the possible known causes. Given this, I do not find any impairment that can be causally related to any incident occurring in February 1991.

Dr. Adams believed that Claimant was not in need of neuropsychological treatment. He did, however, recommend a polysomnography, or sleep evaluation, as well as periodic and regular medical care. Dr. Adams saw no reason why Claimant could not return to full employment.

Employer's Exhibit 19 is the medical report of Dr. Manuel Lopez. Dr. Lopez is a board certified allergist and immunologist. He examined Claimant on October 27, 2000. Claimant's chief complaint was joint pain in the knees, diarrhea, fatigue and memory problems. Claimant stated that those symptoms had been present for eight years. Dr. Lopez obtained a past medical, social, and family history as well as performed a review of systems and a physical examination. Dr. Lopez also reviewed records from the Sterling Heights Clinic, Dr. Klein, Dr. White, Dr. Hyman and Dr. Deming.

Dr. Lopez based his opinion on the history and medical examination he performed, as well as his review of Claimant's medical records. He opined the following:

There is no evidence that Claimant suffered any significant acute medical problems from exposure to the work environment during the 3 months of work in Saudi Arabia. He did not have upper or lower respiratory symptoms, neurologic, osteoarticular or other significant symptoms. He reports that during that period he had frequent loose stools that were not severe enough to require medical evaluation or treatment. There is no clinical or laboratory evidence that Claimant has a severe chronic medical condition affecting the capacity to work or quality of life that could be attributed to the work environment in Saudi Arabia. Claimant reports that for the past 5 years he has had medical problems characterized by joint pain mainly in the knees, diarrhea and fatigue; he also noticed changes in short-term memory. The joint pains are consistent with the diagnosis of degenerative joint disease as demonstrated by an x-ray of the knees performed 4/4/98. However, the joint pains are mild in severity since they have not required rheumatological evaluation or specific treatment. Claimant does not suffer from any impairment of the immune system or immune deficiency. There is no history of increased incidence of severe infections, autoimmunity or hypersensitivity reaction. The limited laboratory studies available are essentially within normal limits. Claimant participated in a research study to compare the use of high dose of antibiotics vs placebo to treat patients that had participated in the Desert Storm war. According to Dr. Deming, Claimant had an improvement in symptoms of 30%, one of the least responsive to the group. (CX 19, page 4)

Findings of Fact and Law

Classification of injury

In some instances the classification of the claimed disability as an occupational disease or traumatic injury may or may not ultimately determine whether proper notice was given, as well as whether a timely claim was filed. *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d.

Cir. 1989), *aff'd* 22 BRBS 170. I can find no appellate decision on whether or not Gulf War Syndrome is traumatic or occupational in nature; however, it is my finding that Gulf War Syndrome is more similar to an occupational disease, and as such, the occupational disease provisions of the LHWCA should apply in evaluating this claim. My reasoning is as follows.

First, prior Board case law has applied the occupational disease provisions of the Act to work-related injuries that are potential hazards to an entire class of employees in employment similar to that of the claimant. *See Gencarelle*, 892 F.2d 173, 23 BRBS 13 (CRT). The risk of toxic exposure in the Persian Gulf was a potential hazard to the entire group of employees working in the same area as Claimant. Claimant was employed as a tank inspector during the Gulf War. He testified that he and the other inspectors were located in Saudi Arabian ports and in the vicinity of SCUD missile explosions. As Claimant and the others heard chemical alarms, they were likewise near the combat areas where toxins were present. Also, all of Employer's employees were given chemical suits and gas masks. Claimant testified that he continually heard chemical alarms sounding in his immediate area. In addition, Employer wrote a memo stating that an entire class of employees in the Persian Gulf area, where Claimant worked, were at risk of being exposed to toxins.²²

Second, the Act defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902 (10). Claimant's present incapacity did not immediately manifest itself during the Gulf War. While Claimant experienced fatigue overseas, his resulting disability did not become manifest until many years later, due to the latent nature of the disease from which he suffers. It is obvious that Congress had a situation such as Claimant's in mind when it enacted Sections 12 and 13 of the Act. These sections provide an extended time period to file and give notice to the employer if an employee suffers from an occupational disease. These provisions are intended for situations in which the work-related disability does not immediately manifest itself. The extended time limit in both sections is contingent on employee awareness of the relationship between the injury, employment and disability. In the instant case, Claimant was not aware of the

²²See Claimant's Exhibit 1.

relationship between his disability and overseas employment until years after his return from the Gulf.

Third, the Ninth Circuit held in *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (1991), that the time of injury was the date when disability attributable to the injury became manifest, not the time of accident. The specific issue in that case was whether the victim of a traumatic injury should be compensated at the average weekly wage rate as of the time of the accident, or as of the subsequent time when the disability attributable to the injury became manifest. The court reasoned that the time of injury was when the employee was aware of the impairment, as opposed to the time of the original accident.

The court discussed its previous ruling of an asbestos case, *Todd Shipyard Corp v. Black*, 717 F.2d 1280 (9th Cir. 1983), in which it held that the time of injury for an occupational disease was the time when the disability due to the disease manifested itself. The *Black* decision was later codified in Section 910(i) of the Act, which states “with respect to a claim for compensation for disability due to an occupational disease which does not immediately result in disability, the time of injury shall be deemed to be the date on which the employee becomes aware of the relationship between the employment, the disease and the disability.” This court also has interpreted the word “injury” to mean the date of onset of disability rather than the specific time of the accident. *See Todd Shipyard Corp. v. Allan*, 666 F.2d 399, 401-02 (9th Cir. 1982); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180 (9th Cir. 1990). In this instance, Claimant’s disability did not manifest until years later after exposure in the Gulf. I adopt the Ninth Circuit’s reasoning and conclude for all of the reasons previously articulated, that Gulf War Syndrome is an occupational disease.

Section 12 Timely Notice

Section 12(a) of the Act provides that “Notice of injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of a relationship between the injury or death and the employment, except that in the case of occupational disease . . . notice shall be given within one year . . .” *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Sheek v. General Dynamics Corp.*, 18 BRBS 1

(1985), *on recon.*, 18 BRBS 151 (1986). The judge must determine the date on which the claimant became aware of, or should have become aware of, the relationship between the injury, the employment and the disability. *Martin v. Kaiser Co.*, 24 BRBS 112 (1990). It is the claimant's burden to establish timely notice.

During Claimant's employment in the Persian Gulf, from November 6, 1990 through January 20, 1991, Claimant testified that he only experienced fatigue. However, this one symptom did not cause him to believe he had been injured. Claimant experienced chronic fatigue, throbbing joint pain, diarrhea and problems sleeping a year after his return from the Gulf. It is obvious that Claimant was not aware of the work-related nature of his subsequent health problems during his period of employment in the Persian Gulf.

Claimant testified that he experienced deteriorating health following his employment with Employer, but that his health remarkably worsened between 1992 and 1997. Self-reported histories in his medical records show that Claimant suspected he could have been exposed to chemicals during the Gulf War. Claimant was unable to effectively corroborate his suspicions through independent research, however, because the US government had not published any reports concerning the nature and extent of toxic exposure in the Persian Gulf during this period.

In addition, the physicians treating Claimant during this time, prior to 1996, provided no medical basis to corroborate his suspicions. Dr. Louis White was the first medical doctor to suspect that Claimant suffered from Gulf War Syndrome. He examined Claimant on August 6, 1996. Claimant's symptoms included throbbing joint pain, chronic fatigue and chronic diarrhea since returning from overseas. Dr. White wrote a letter to the Department of Labor, dated October 3, 1996, stating Claimant "has medical problems which in my opinion have a reasonable medical probability of being caused or aggravated by something he was exposed to overseas during Desert Storm." It was not until 1996, therefore, that Claimant's suspicion of Gulf War Syndrome was corroborated by a medical doctor.

Despite the lack of an affirmative diagnosis prior to 1996, however, because he read an ad for Dr. Hyman's study and suspected his symptoms might be related

to toxic exposure from the Gulf War, Claimant, on May 30, 1995 filed his claim in this matter. Employer was given notice of this claim on May 22, 1996. In other words, Claimant actually filed his claim and made Employer aware of his claim even before he himself was aware of the relationship between his condition and his employment. Therefore, I find timely notice pursuant to § 12(a).

Despite my finding, even assuming Claimant's notice was untimely, Employer in this instance has shown no prejudice. Section 12(d) of the Act will excuse the claimant's untimely notice to employer, if employer was not prejudiced by the failure to provide such notice. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). Prejudice is established when the employer demonstrates that, due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978), *rev'g* 2 BRBS 272 (1975); *White v. Sealand Terminal Corp.*, 13 BRBS 1021 (1981). In the absence of evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, that an employer has been given sufficient notice under Section 12. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Accordingly, an employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). A generalized claim of not being able to investigate while the claim is still fresh is insufficient to prove prejudice. *See Ito Corporation v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

Employer here offered no evidence showing it was prejudiced by untimely notice. To the contrary, Employer had knowledge and notice, as early as November 14, 1991, of a possible relationship between employment during the Gulf War and resulting work-related injuries. An inter-office memo, dated November 14, 1991, stated that Employer was aware of potential long-term health hazards to its employees due to exposure of harmful toxins during the Gulf War.²³ Employer, therefore, had knowledge of possible toxic exposure with resulting disability well before Claimant, and more than three years prior to Claimant filing his claim.

²³See Claimant's Exhibit 1.

In addition, while notice was given to Employer in May 1996, Employer did not examine Claimant until September 2000, more than four years later. Employer had sufficient opportunity to investigate this claim and provide medical services at the time Claimant provided notice. In sum, Employer has made no showing it was prejudiced.

Section 13 Timeliness

Section 13 (a) of the Act provides that Claimant has one year to file a claim after injury. The time for filing will not begin to run until the employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. Section 13 (b) of the Act provides that if the injury is classified as an occupational disease, the claimant will have two years in which to file his claim. This time does not begin to run until the employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment.

For the reasons previously provided, I find Claimant filed his claim prior to his true awareness of the relationship between his condition and his employment, and regardless of the time period, Claimant's claim was timely filed.

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It must be further recognized that all factual doubts must be resolved in favor of Claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969). Furthermore, it has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

Claimant alleges that he sustained exposure to toxic substances while employed by Employer during the Gulf War in Saudi Arabia between November 6, 1990 and January 20, 1991. There is no evidence to refute Claimant's claim that he was exposed to toxic agents during his period of overseas employment. Claimant also testified that he suffers from joint pain, chronic diarrhea, short-term memory loss, poor concentration, difficulty understanding daily activities/tasks, anxiety, muscle pain, sleep problems, moodiness, irritability, and chemical sensitivities. Claimant claims that these symptoms are evidence of Gulf War syndrome, a chronic multi-symptom condition.

The Center for Disease Control's 1998 case definition of "Gulf War Illness" is "a chronic multi-symptom illness." One or more of the listed chronic symptoms must present for six months or more. These categories are fatigue, mood/cognition related symptoms (including feelings of depression, difficulty remembering or concentrating, feeling moody, anxious, trouble finding words, lack of interest in sex or difficulty sleeping), and musculoskeletal related symptoms (including joint pain, stiffness, or muscle pain).²⁴ Claimant alleges that he suffers from symptoms in all three of the CDC's categories. He maintains that his symptoms have manifested over the last six years, well over the case definition's minimum six month period.

Claimant testified that he was in excellent physical and mental health prior to his employment with Employer. The medical records dating from 1986 until Claimant was deployed to the Persian Gulf do not show that Claimant suffered from any of the symptoms he currently experiences, with the exception of fatigue. His testimony of good health is bolstered with his excellent occupational performance while in Saudi Arabia. Claimant's testimony regarding his present state of poor health is therefore credible and supports his contention that he suffered a harm during the Gulf War.

²⁴See Claimant's Exhibit 26, page 30.

The medical evidence presented likewise supports Claimant's allegations of an injury. Prior to 1996, no doctor was able to affirmatively diagnose Claimant's symptoms. In August 1996, Dr. Louis White examined Claimant. Claimant complained of joint pain, chronic fatigue and chronic diarrhea. Dr. White subsequently wrote a letter to the Department of Labor stating, Claimant "has medical problems which in my opinion have a reasonable medical probability of being caused or aggravated by something he was exposed to overseas during Desert Storm."

In 1998, Claimant participated in the Desert Storm Syndrome Study conducted by Drs. Hyman and Deming. At the conclusion of the Study, Dr. Hyman diagnosed Claimant with Gulf War Syndrome. He stated that Claimant's condition began while he was working in the Persian Gulf.

Dr. Yee examined Claimant in 1999 and 2000. Dr. Yee's impression of Claimant was a "1. History of Gulf War Syndrome; 2. History of arthralgias, particularly involving both lower extremities, most likely related to #1 above; 3. previous history of basal cell carcinoma."

Dr. William Rea, a specialist in environmental medicine, examined Claimant on September 18, 2000. Dr. Rea took a history of Claimant and performed numerous objective tests. All of the findings from the tests were compatible with damage from toxic exposure during the Gulf War. Dr. Rea subsequently opined that Claimant suffered from toxic exposure as a result of working overseas during the Gulf War. Dr. Rea stated that Claimant's symptoms were compatible with those of combat veterans diagnosed with Gulf War Illness. Claimant's own testimony is supported by Dr. Rea's medical conclusion, as well as that of Drs. White, Hyman, Deming, and Yee, and is sufficient to constitute evidence of physical injury.

Dr. Nancy Didriksen examined Claimant on September 21, 2000. Dr. Didriksen is a board certified psychologist. She performed a clinical interview of Claimant and administered numerous tests. Dr. Didriksen too opined that Claimant suffered from toxic exposure and resultant illness. Claimant's test results were consistent with other individuals exposed in the Persian Gulf who have been evaluated in Dr. Didriksen's office and reported in the literature.

Dr. Didriksen's impression was "toxic encephalopathy (mild, chronic, reversibility uncertain without treatment and avoidance of toxic/neurotoxic substances) and psychological factors associated with (but secondary to) physical condition classified elsewhere." It was also Dr. Didriksen's opinion that "the observed current neurocognitive deficits and compromise in emotional equilibrium (secondary to illness and disability) have resulted from exposure in the Persian Gulf, while working as a tank inspector for General Dynamics Corporation during 1990 and 1991." Her report, therefore, supports Claimant's contention that he suffered neuropsychological damage while in the Gulf War. Claimant's own testimony is supported by Dr. Didriksen's medical conclusion and is sufficient to constitute evidence of mental injury.

In order for Claimant to establish the existence of working conditions which could have caused the harm, Claimant must show that he was in the area of exposure and that his condition was caused by, or likely to be caused by his employment. Title XVI, of Division C, of Public Law 105-277, "Service Connection for Persian Gulf War Illnesses" does not directly relate to civilian defense workers, but I find it should be considered as persuasive in establishing Claimant's existence of possible working conditions. This law provides a legal presumption for U.S. Military Veterans that they were exposed to a list of toxic substances during the Gulf War. Claimant alleges exposure to several of the substances on the list, including pyridostigmine bromide, pesticides, organophosphates, diesel heater fumes and depleted uranium.

It is uncontested that Claimant was employed by Employer in Saudi Arabia during the Persian Gulf War and that he was stationed in contaminated areas. The working conditions which Claimant argues caused his health condition included use of the anti-nerve gas pill, pyridostigmine bromide, exposure to low-level organophosphates, pesticides, diesel fuel fumes and fall out from SCUD missiles. Additionally, Claimant relies on congressional findings and numerous medical articles to support his contention that his symptoms were caused by exposure to toxic substances.

Claimant testified and presented uncontested evidence showing he was located in Saudi Arabian ports inspecting M1A1 tanks during the Gulf War. As Claimant inspected these tanks, chemical agent alarms sounded continuously. During these alarms, Claimant donned his MOPP suit and gas mask. Claimant was

also in the vicinity of SCUD missile explosions and in northeastern Saudi Arabia during the bombing of the Iraqi chemical storage and production facilities.

Claimant testified and it was uncontested that Claimant was issued pyridostigmine bromide anti-nerve gas pills to counteract possible chemical agents. Claimant testified that he took these pills. Claimant also submitted a memo stating that Employer's employees were in fact given various prophylactic treatments for chemical and biological threats (nerve agents, Anthrax, etc.).²⁵

Claimant presented medical articles regarding the hazards of exposure to organophosphates. Claimant presented credible testimony that he was also exposed to pesticides, and diesel fumes from fuel. He presented substantial evidence in medical articles and congressional reports outlining the effects and symptoms of exposure in these situations. In addition, both Drs. Rea and Didriksen opined that Claimant was exposed to multiple toxic agents and biological agents in the Gulf. Claimant was only present in the Gulf during his employment with Employer.

In sum, I find that Claimant has provided sufficient evidence, through his testimony, as well as the testimony of Drs. White, Yee, Hyman, Rea and Didriksen, in addition to various medical articles and congressional reports, to establish that he suffers both physical and mental injury and working conditions existed during his employment with Employer in Saudi Arabia which could have caused his injuries. Consequently, Claimant has satisfied both prongs of the causation inquiry and invoked the Section 20 presumption.

Employer is unable to rebut the Section 20 presumption with substantial and countervailing evidence. But assuming rebuttal, after weighing the evidence as a whole, I find that Claimant has still established causation.

In order to rebut the presumption, Employer offered the medical reports of Drs. Adams and Lopez, as well as various articles.²⁶ Dr. Adams is board certified

²⁵See Claimant's Exhibit 1.

²⁶ Employer's Exhibit 1 was a replica of Claimant's Exhibit 12, which was a medical article I previously reviewed and which actually supported Claimant's position. Employer's Exhibits 2-7, and

in clinical neuropsychology and clinical psychology. He examined Claimant on September 27, 2000, at which time, he performed a neuropsychological assessment. Dr. Adams obtained a social, employment and medical history of Claimant. Claimant described generally his various types of toxic exposure while employed in the Persian Gulf.

After administering a battery of tests, Dr. Adams concluded that Claimant had no neuropsychological impairment. There was no evidence of neurological, neuroimaging, or neuropsychological correlation with Claimant's symptoms. Dr. Adams remarked that Claimant's presentation of his history was not consistent among his various health care providers. "What appears to me is a trend toward a refinement of the symptoms to match what is reported in various documents defining or explicating what Gulf War illness might be."

Dr. Adams stated that he would have preferred more specific details as to the types of exposure Claimant suffered. He also believed "there are multiple pathways or possibilities of hypothesis to link Claimant's employment work during his months in Saudi Arabia to the emergence of symptoms. However, none of the causal links are well-defined." Dr. Adams stated that Claimant did not suffer from pre-existing conditions or prior injuries. In fact, he stated that "Claimant presents with certain symptoms that are self reported and bear some relation to those presentations described in the medical literature regarding Gulf War Illness. Efforts to understand the etiology or etiologies of these presentations have not been successful, but are obviously ongoing." In the instant case, "there are no objective findings confirming neurobehavioral disorder from any of the possible known causes."

It appears that Dr. Adams is not ruling out Gulf War Syndrome. Rather, before such a diagnosis could be obtained, more information and details were needed regarding the types of exposure suffered by Claimant. In addition, while Dr. Adams is qualified as a psychologist, he does not allege any particular experience with evaluating Gulf War Veterans or any particular knowledge of the chemical exposure associated with employment in combat zones.

9-10 included various website articles and newspaper articles. While interesting reading, the trustworthiness of these website articles is questionable. Also, while the newspaper articles are informative, they are merely one reporter's opinion about the existence of Gulf War Syndrome.

Dr. Lopez, an immunologist, allergist and rheumatologist, examined Claimant on October 27, 2000. He performed a review of Claimant's systems and a physical examination. Dr. Lopez also reviewed Claimant's past medical records from the Sterling Heights Clinic and Drs. Klein, White, Hyman and Deming.

Dr. Lopez's opinions were based on Claimant's history, medical examination and review of the medical records. He determined that there was no evidence that Claimant suffered any acute medical problems as a result of exposure to the work environment during the Gulf War. Dr. Lopez determined that Claimant did not have upper or lower respiratory symptoms, neurologic, osteoarticular or other significant symptoms while overseas. Claimant had reported loose stools during his overseas employment, but it was never serious enough to warrant medical attention. There was neither clinical nor laboratory evidence showing that Claimant suffered from a severe chronic medical condition that could be attributed to his overseas work environment.

Dr. Lopez determined that Claimant's joint pains were consistent with the previous diagnosis of degenerative joint disease. He believed that Claimant's joint pains were mild in severity because he had not required a rheumatological evaluation or specific treatment. Dr. Lopez opined that Claimant suffered from neither an immune deficiency nor an impairment of the immune system. After performing various laboratory studies, Dr. Lopez concluded that Claimant had no history of increased incidence of severe infections, autoimmunity or hypersensitivity reaction. Dr. Lopez also remarked on Dr. Hyman's study, in which Claimant's improvement only rated 30%, one of the least responsive to the treatment.

Dr. Lopez is qualified as a allergist and immunologist. However, he does not allege any particular experience with evaluating Gulf War Veterans or any particular knowledge of the chemical exposure associated with employment in combat zones.

Because Drs. Adams and Lopez lack the experience Dr. Rea possesses with Gulf War veterans, I do not find Employer's rebuttal evidence substantially sufficient to rebut the § 20 presumption. Assuming it to be, however, when weighing the evidence as a whole, I rely upon the opinions of Drs. White, Hyman, Yee, Rea and Didriksen over Drs. Adams and Lopez because of the formers

experience with Gulf War Veterans and conclude that Claimant's condition is related to his overseas employment with Employer.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Neither Dr. Hyman nor Drs. Rea, Didriksen or Adams, or Lopez made any mention of MMI. However, both Drs. Hyman and Rea stated that with treatment, Claimant's condition could possibly improve. I, therefore, conclude that Claimant has yet to reach MMI. As such, any compensation awarded to him will be temporary in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on

which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

After the Gulf War, Claimant resumed working for Employer. When he was terminated due to a reduction in force in February 1991, Claimant began and ran his own vending machine business. He testified that because he had problems with joint pain and fatigue, he turned the business over to his wife and son. Immediately thereafter, in 1994, Claimant began working for Michigan Bell Telephone Company. He works as an electronic technician and remains working there today. He works 40 hours a day, 5 days a week, at an hourly rate of \$22. Claimant works the night shift, because the activities demanded of him are less physically and mentally challenging.

Dr. Hyman, in a questionnaire regarding his Desert Storm Syndrome Study, stated on April 7 and June 5, 2000 that it was necessary for Claimant to work intermittently or to work less than a full schedule because of his condition, for an indefinite period. Dr. Hyman believed that Claimant had a cognitive loss due to Gulf War Syndrome which could impair his ability to perform essential functions of his job.

Dr. Rea testified that Claimant's present condition impaired his work ability. He understood that Claimant was currently working full time. However, Dr. Rea determined that Claimant's present work ability was not the same as in the past. Claimant complained of lack of stamina and problems thinking. Claimant's job at the telephone company "doesn't take a lot of thinking," while his job as a tank inspector was very meticulous.

Dr. Didriksen also testified regarding Claimant's ability to work. She stated "Claimant's very impaired memory and poor executive functioning preclude effective workplace functioning in any setting." It was her opinion that Claimant could resume gainful employment and function adequately without restrictions once he regained neurocognitive functioning and physical health.

Claimant's testimony, as well as that of Drs. Hyman, Rea and Didriksen, show that Claimant is not totally disabled. Claimant is capable of working and in fact has been steadily employed since returning from the Gulf War. While the evidence does suggest that Claimant's physical and mental abilities have diminished, the fact remains he departed Employer only because of a reduction in force and is earning more today than he earned with Employer.

In 1991 Claimant was laid off by Employer due to a reduction in force, not because he was unable to perform his work. Claimant has not offered any evidence to show that, had he remained working for Employer, he would not have continued to do so until he began working for the telephone company in 1994. There is no medical evidence to support Claimant's contention that he was unable to perform the duties of tank inspector when he was released by Employer.

During the three year gap, from 1992 through 1994, Claimant did not seek private employment, but attempted a vending machine business. Claimant testified that he was unable to sustain the duties required of operating his own business because of his medical condition and turned the business over to his family. However, no medical evidence supports Claimant's inability to perform such tasks and I am unwilling to accept Claimant's testimony alone that he was totally disabled during this period.

In 1994, Claimant began working for the telephone company and continues to do so today. Claimant's wages are in excess of what he earned as a tank inspector.²⁷ In sum, I find that Claimant has proven no economic loss and is not entitled to compensation.

Medical expenses

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for

²⁷Claimant's base pay while employed by Employer was \$33,667 per year. However, since Claimant has been employed by the telephone company, his average yearly wage exceeds \$45,085.

a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

Claimant sought examination and/or treatment from Drs. White, Yee, Hyman, Rea, and Didriksen. Drs. Rea and Didriksen concluded that the etiology of Claimant's symptoms was toxic exposure during the Gulf War. For reasons previously stated, I accept the opinions of Drs. Rea and Didriksen. Consequently, Claimant has sufficiently established that his exposure to chemicals while employed in the Persian Gulf is causally connected to his current condition of a chronic multi-system illness. Employer is therefore liable for all medical expenses determined to be both reasonable and necessary.

Dr. Rea testified that Claimant's physical symptoms could improve with treatment. Dr. Didriksen recommended a re-evaluation in 12 to 18 months, as well as a formal neurocognitive rehabilitation program and therapy. I find that these treatments are both reasonable and necessary, and as such, Employer is liable for those expenses, as well as for the appointment costs associated with Claimant's visits to Drs. White, Yee, Hyman, Rea, and Didriksen. Employer is likewise liable for all future reasonable and necessary medical expenses resulting from Claimant's chronic multi-system illness.

Section 14 (e) Penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer was advised of the injury on May 22, 1996 and filed a notice of controversion on October 30, 1996, clearly more than 14 days after learning of the injury. Claimant is owed 14(e) penalties, the exact amount to be calculated by the District Director.

ORDER

It is hereby **ORDERED** that:

1. Employer/Carrier owes no compensation;
2. Pursuant to Section 7 of the Act, Employer/Carrier are responsible for the expenses associated with Drs. White, Yee, Hyman, Rea and Didriksen, as well as all other reasonable and necessary medical expenses Claimant might so incur, regarding this work-related condition;
3. Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;
4. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);
5. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. § 702.132; and
6. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 18th day of April, 2001 at Metairie, Louisiana.

A

C. RICHARD AVERY

Administrative Law Judge

CRA:haw